U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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DATE: SEP 1 2 2011

OFFICE: NEBRASKA SERVICE CENTER

[redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you, Lori B for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition on January 20, 2009. The director reaffirmed that decision on motion on April 13, 2009. The petitioner appealed the decision to the Administrative Appeals Office (AAO) on May 11, 2009. The appeal will be dismissed.

The petitioner is a truck sales and septic spray business. It seeks to employ the beneficiary permanently in the United States as a waste management chemist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, which the U.S. Department of Labor (DOL) approved, accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not meet the specified job requirements or qualify for the classification sought. Specifically, the director determined that the beneficiary did not possess the requisite experience.

On appeal, counsel asserts that the beneficiary possessed the requisite experience for the position. The AAO will uphold the director's decision, finding that the beneficiary did not obtain five years of progressive post-baccalaureate experience in the specialty before the priority date.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree *followed by* at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a U.S. doctorate or a foreign equivalent degree." *Id.* (Emphasis added.)

The beneficiary earned a foreign four-year bachelor's degree in chemistry from the University Faculta De Sao Paulo Bernardo Do Campo in 2005. The petitioner documented the beneficiary's work experienced prior to completing her bachelor's degree. Thus, the issues are whether those credentials qualify the beneficiary for the classification sought and meet the specified job requirements.

Eligibility for the Classification Sought

As noted above, DOL certified the ETA Form 9089 in this matter. DOL determines whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries Congress assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. Federal courts have recognized this division of authority. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

In 1991, when the final rule for 8 C.F.R. § 204.5 appeared in the Federal Register, the Immigration and Naturalization Service (the Service) (now U.S. Citizenship and Immigration Services (USCIS)), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, an alien must have at least a bachelor's degree.

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991).

The petitioner submitted an evaluation from [redacted] of Morningside Evaluations and Consulting dated December 3, 2007. He concludes that the beneficiary possesses the equivalent to a Bachelor of Science degree in chemistry in the United States. [redacted] states that the beneficiary's academic program was accredited and that he bases his analysis on the beneficiary's courses, number of credits earned, number of years of coursework, grades attained, and final diploma. Consistent with the evaluation submitted, the AAO finds that the beneficiary's four-year bachelor's degree in chemistry is comparable to a U.S. baccalaureate.

As the beneficiary has a foreign equivalent degree to a U.S. baccalaureate, the AAO will review the record to determine whether the petitioner has documented that the beneficiary completed the necessary five years of post-baccalaureate progressive experience in the specialty before the priority date of April 16, 2008. The petitioner submitted letters documenting that the beneficiary worked as a chemist from August 1999 to August 2003 and from January 2004 to October 2005. The beneficiary did not complete her bachelor's degree until December 2005, a date that fell after this documented employment. Furthermore, it would have been a mathematical impossibility for the beneficiary to complete five years of experience between December 2005 and April 2008.

On appeal, counsel asserts that the beneficiary attended her bachelor's degree program on a full-time basis on week nights and on Saturday mornings while she was working full-time during the work week as a chemist. He claims that the beneficiary's experience during that time was progressive in nature. Counsel mischaracterizes the director's concerns. The issue is not whether the beneficiary's experienced was "progressive" but whether it "followed" the beneficiary's bachelor's degree as required under 8 C.F.R. § 204.5(k)(2), quoted above. The AAO finds that the beneficiary did not obtain the necessary experience after her bachelor's degree program, but rather during it.

Moreover, the proffered position is a profession. Thus, progressive experience in the "specialty" must be professional experience. As defined at Section 101(a)(32) of the act, profession "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as follows:

> [O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

While the beneficiary lists experience as a "chemist" prior to completing her bachelor's degree, any experienced obtained prior to earning a bachelor's degree does not require a bachelor's degree for entry into the occupation and, thus, is not professional experience.

The petitioner must demonstrate that, on the priority date, the beneficiary had the requisite qualifications. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). Because, as of the priority date, the beneficiary had neither (1) a U.S. advanced degree or foreign equivalent degree, nor (2) a U.S. baccalaureate degree or foreign equivalent degree and five years of progressive experience in the specialty, she does not qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien employment certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the alien employment certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in an alien employment certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the alien employment certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien employment certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien employment certification.

In this matter, Part H, line 4, of the alien employment certification reflects that a master's degree in chemistry is the minimum level of education required. Line 6 reflects that one year of experience in the proffered position is required. Line 8 reflects that a combination of education and experience is acceptable in the alternative. A bachelor's degree and five years of experience are acceptable. Line 9 reflects that a foreign educational equivalent is acceptable.

The beneficiary did earn a foreign four-year bachelor's degree in chemistry from the University Faculta De Sao Paulo Bernardo Do Campo in 2005, which is equivalent to a bachelor's degree in the United States. However, the beneficiary did not complete five years of post-baccalaureate progressive experience in the specialty before the priority date. Even if the AAO concluded that the alien employment certification did not require the experience to be post-baccalaureate experienced,

that conclusion would result in a finding that the position does not require an advanced degree professional pursuant to 8 C.F.R. § 204.5(k)(4).

The beneficiary does not have a U.S. master's degree or a foreign equivalent degree. The beneficiary also does not have a U.S. baccalaureate degree or a foreign equivalent degree *followed by* five years of progressive experience in the specialty. Thus, the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the alien employment certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.